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IN THE

Supreme Court of the United States

October Term, 1971

FRANCIS PETER CROSBY and
VINCENT JOSEPH CALISE,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	2
Statement of Case	3
Reasons for Allowance of Writ	4
I.—The evidence against petitioners was not sufficient to support a conviction of any of the crimes charged	4
II.—The charge was erroneous as to Crosby's alleged participation as an aider and abetter	6
III.—The substantive counts in the indictment are insufficiently charged, in consequence of which petitioners' constitutional rights are violated	7
Conclusion	8
Appendix:	
Judgment of Court of Appeals	1a

Cases Cited

Giragosian v. United States (C.A. 1), 349 F. 2d 166	7
Johnson v. United States (C.C.A. 4), 95 F. 2d 813	8
Jones v. United States (C.A. 10) 365 F. 2d 87	6

PAGE

Krulewitch v. United States, 336 U.S. 440 6

Morgan v. United States (C.C.A. 10), 159 F. 2d 85 7

Russell v. United States, 369 U.S. 749 8

Robinson v. United States (C.C.A. 6) 30 F. 2d 25 ... 5

United States v. Baker, 419 F. 2d 83 6

United States v. Britton, 107 U.S. 655 8

United States v. Jacobs, 431 F. 2d 754 6

United States v. Matsinger (C.A. 3), 191 F. 2d 1014 8

United States v. Mulloney (D.C. Mass.) 8 F. Supp. 674, aff'd 79 F. 2d 566, cert. den. 296 U.S. 658 5

United States v. Provenzano (C.A. 3), 334 F. 2d 678, cert. den. 379 U.S. 947 7

United States v. Spock, 416 F. 2d 165 6

United States v. Titus (C.A. 2), 210 F. 2d 210 7

United States v. Wiggenhorn (C.A. 9), 312 F. 2d 289 7

Statutes Cited

18 U.S. Code Sec. 371 ..... 1, 2

18 U.S. Code Sec. 656 7

18 U.S. Code Sec. 657 ..... 1, 2, 3, 5

28 U.S. Code Sec. 1254 2

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners Francis Peter Crosby and Vincent Joseph Calise respectfully pray that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on September 16, 1971, affirming a judgment of the United States District Court for the Southern District of New York, convicting them of conspiracy wilfully to misapply the funds of a small business investment company (18 U.S. Code Sec. 371) and (as to petitioner Crosby) of substantive violations (18 U.S. Code Sec. 657).

Opinion Below

No opinion was rendered by the United States Court of Appeals herein.

Jurisdiction

The judgment of the aforesaid Court of Appeals was rendered and entered on September 16, 1971. The time to file the present petition was duly extended by a Justice of this Court to November 15, 1971.

The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1254. The basis for federal jurisdiction in the United States District Court was the provisions of 18 U.S. Code Sec. 371 and 18 U.S. Code Sec. 657.

Questions Presented for Review

1. Was the evidence against petitioners sufficient to support a conviction of any of the crimes charged?

2. Was the charge erroneous as to petitioner Crosby's participation as an aider and abetter?

3. Does the indictment sufficiently charge the commission of the substantive crimes, and are its shortcomings a deprivation of the rights guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States?

Statutes Involved

18 U.S. Code Sec. 371 provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such person commit any act to effect the object of the conspiracy, each shall be

fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S. Code Sec. 657, so far as pertinent provides:

> "Whoever, being an officer, agent or employee of or connected in any capacity with . . . any small business investment company . . . embezzles, abstracts or wilfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . ."

Statement of Case

Both petitioners were convicted on the conspiracy count, and petitioner Crosby on the five substantive counts. A codefendant, one Pierson, pleaded guilty to the first substantive count (count 2 of the indictment.)

It was the Government contention that Crosby, through nominees, had acquired a small business investment company, namely Roosevelt Capital Corporation; that the latter made a $60,000 loan to United Film World, a corporation in which Crosby had an interest, and another loan to Trans-World Theatricals, Inc.; that the second loan was conditioned upon a reloan to Contractors Guild, Inc., which Crosby was claimed to control through a nominee. It was also urged that one Olanow, a Government witness and alleged coconspirator, had purchased 1,000 shares of Texas Gulf Sulphur stock and delivered them to the First National City Bank against payment; that the stock declined, resulting in a $10,000 loss; and that the repayments of advance and loss were taken, directly or indirectly, by Crosby and Pierson. The Government elected at the conclusion of trial to proceed on the theory of wilful misapplication of Roosevelt Capital Corporation's funds, charging Crosby to be a person connected with that company as an agent, while

the Court submitted to the jury the issue of whether or not Crosby was an aider or abetter and thus guilty as a principal. As for petitioner Calise, the Government attempted to show that he assisted in the conversion of funds after their disbursement by the corporation.

The Government's case rested mainly on the testimony of three persons with serious criminal records—Olanow, Pierson and one Stone, the latter having been convicted of perjury. According to Pierson, he had formed United Film (for motion picture distribution purposes) prior to the acquisition of Roosevelt Capital), and that Crosby was to obtain a 50% interest in United upon certain conditions which never materialized, so that he never regarded Crosby as a co-owner; accordingly, Pierson issued all of United's checks and was in complete control. As for Contractors Guild, the witness Stone owned all the stock but claimed to do so as Crosby's nominee. Stone's testimony is permeated with repeated admissions of perjury. The Government admitted that the loan to Trans-World was at most an error of judgment but claimed the reloan of $44,000 to Contractors was tantamount to a wilful misapplication of funds.

We shall not unduly extend this petition by a minute analysis of the evidence. However, it is abundantly evident that the factual issues were closely contested, so as to render the protection of petitioner's rights imperative.

REASONS FOR ALLOWANCE OF WRIT

I.

The evidence against petitioners was not sufficient to support a conviction of any of the crimes charged.

The case was submitted to the jury on the theory of conspiracy to misapply Roosevelt Capital Corporation

funds. Thus petitioner Calise was charged with assisting in such conversion after those funds were loaned to United and after the funds loaned to Trans-World were reloaned to Contractors. Even if it be assumed that there was a conspiracy to misapply Roosevelt funds, it would have terminated with the loan to United—the loan to Trans-World being admittedly no application. Clearly the relending by Trans-World to Contractors did not come within the scope of Sec. 657.

The further unsound construction of the law is illustrated by the Government's inclusion in the indictment allegations as to the means by which the alleged conspirators would carry out their scheme. Thus in the conspiracy count, at paragraph 3(c)iii, it is charged that Crosby and Pierson diverted moneys and securities whereby Olanow attempted to repay a loan made by Roosevelt. Such conduct, assuming it occurred, was no misapplication of Roosevelt funds.

Likewise the loan to United alleged in par. 3(c)i of the conspiracy count was admittedly for proper purposes which Pierson detailed to Crosby (see record, pp. 442-443) and was no crime under the law. See *United States* v. *Mulloney* (D.C. Mass.) 8 F. Supp. 674, affd. 79 F. 2d 566, cert. den. 296 U.S. 658.

Moreover, the case was submitted to the jury on the theory of misapplication of moneys and funds, although the alleged reloan from Trans-World to Contractors, the alleged attempt to divert the Olanow repayment and Calise's signing of checks of Contractors and United all involved "credits" rather than moneys or funds. See *Robinson* v. *United States* (C.C.A. 6) 30 F. 2d 25.

Particularly as to Calise, charged only with conspiracy, the proof was crucially insufficient to justify submission to the jury. There was no evidence of his participation in the acquisition of Roosevelt or in its operation or affairs,

or even that he was an agent or employee of that corporation. The Government's apparent case against him seemed to rest on the charge that after the loans to United and Trans-World he assisted in a further misapplication. If anything, this might conceivably indicate an intent to convert funds of borrowers, but not the conspiracy of which he was accused. His posture was manifestly that of chauffeur and errand boy (109, 434, 629). It must also be remembered that mere knowledge, and even approval of or acquiescence in, the object and purpose of an alleged conspiracy, without agreement to cooperate in accomplishing its object, is not sufficient to render one a party thereto. *Jones* v. *United States* (C.A. 10) 365 F. 2d 87.

In this connection it must be noted that the Government procured the convictions sought to be reviewed by the use of the conduct and statements of coconspirators. The use of such evidence has been held by the First Circuit to be improper. *United States* v. *Spock*, 416 F. 2d 165. The Second Circuit, however, appears to follow a contrary doctrine. *United States* v. *Baker*, 419 F. 2d 83; *United States* v. *Jacobs*, 431 F. 2d 754. This difference suggests the propriety of clarification, especially in view of this Court's holding in *Krulewitch* v. *United States*, 336 U.S. 440.

II.

The charge was erroneous as to Crosby's alleged participation as an aider and abetter.

The Court charged (901, 902) that Crosby could be found guilty of the five substantive counts as an aider and abetter if he knew what was afoot, made himself part of the scheme and took steps to see that the payments would be made. The Court made no mention of the requirement that, in order to convict as an aider or abetter, the jury had to find that a person other than defendant had

committed the substantive offense. Exception was duly noted (907), inasmuch as the only conceivable such principal was Pierson, who had pleaded guilty to only one of those five substantive counts.

In order to convict a defendant of aiding and abetting the commission of a substantive offense, the proof must establish that the crime was committed by some one. *United States* v. *Provenzano* (C.A. 3), 334 F. 2d 678, cert. den. 379 U.S. 947. "One cannot aid and abet in the commission of a crime unless there is another who has committed the offense." *Morgan* v. *United States* (C.C.A. 10) 159 F. 2d 85. This rule has been applied to charges under a similar statute (18 U.S. Code Sec. 656) involving misapplication of bank funds, namely, a conviction for aiding and abetting will not be upheld in absence of proof of the principal's guilt. *United States* v. *Titus* (C.A. 2), 210 F. 2d 210; *Giragosian* v. *United States* (C.A. 1), 349 F. 2d 166. Accordingly, the refusal to charge as requested with respect to this point was reversible error.

III.

The substantive counts in the indictment are insufficiently charged, in consequence of which petitioners' constitutional rights are violated.

Both prior to trial and at the close of the Government's case, counts 2 through 6 were the subject of a defense motion to dismiss for insufficiency (13, 75). Both motions were denied. The five counts occupy less than a page and merely allege in the statutory verbiage that defendants wilfully misapplied funds and credits on certain dates and in certain amounts.

In *United States* v. *Wiggenhorn* (C.A. 9), 312 F. 2d 289, affirming the dismissal of an indictment, the Court unequivocally declared the law to be well settled that

"an indictment charging that a defendant wilfully misapplied the moneys, funds or credits of a bank . . . is fatally defective unless it contains allegations to show how the application of the moneys, funds or credits of the bank was made, and that such application was an unlawful one. To like effect are *Johnson* v. *United States* (C.C.A. 4), 95 F. 2d 813; *United States* v. *Matsinger* (C.A. 3), 191 F. 2d 1014; and this Court's holding in *United States* v. *Britton*, 107 U.S. 655.

That this principle is mandated by the Fifth and Sixth Amendments, and that an indictment violative of the requirement of precise and specific allegations, cannot be sustained, are matters thoroughly discussed and expounded in the opinion of Mr. Justice Stewart in *Russell* v. *United States*, 369 U.S. 749.

Nor was the indictment's insufficiency herein a mere technicality, for while the Government expressly rested its case on wilful misapplication (763-764), the defendant Pierson pleaded guilty to embezzlement (7) on the second count. Thus it becomes a matter of speculation whether the jury's verdict determined that petitioner Crosby was guilty as a principal or as one aiding a wilful misapplication. In short, the inadequate format of the indictment was virtually a permission to the Government to present whatever evidence it desired, with the result that a conviction may well have been predicated on evidence not even presented to the grand jury.

Conclusion

The case is one wherein the two petitioners have been convicted and sentenced under circumstances indicative of deviations from established law. It is further manifest that the present application presents meritorious and certainly arguable questions of a kind likely to arise in other

cases and calling for authoritative disposition; also that in at least one instance there is a conflict of opinion among the several Courts of Appeals. The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioners be granted such other, further and different relief as may seem proper.

Dated: New York, N.Y.
November 10, 1971

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(APPENDIX)

(Judgment of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and seventy-one.

Present:

HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS PETER CROSBY, *et al.*,

Defendants,

FRANCIS PETER CROSBY, and VINCENT JOSEPH CALISE,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

NO OPINION